18

Office - Supreme Court, U. S.
FILED
JUL 24 1953
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 204

TOLLEY B. SPRIGGS,

Petitioner,

vs.

UNITED STATES OF AMERICA

PETTTION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF.

H. CLIFFORD ALLDER,
Counsel for Petitioner.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
A. Summary Statement of the Matter Involved	
Factual Situation	2
Statement of the Case	2
B. Statement of the Jurisdiction of this Court	3
C. The Question Presented	3
D. Reasons Relied on for the Allowance of the Writ	4
Prayer for Writ	6
Brief in Support of Petition for Writ of Certiorari	7
Opinions of Courts Below	7
Jurisdiction	7
Statement of the Case	8
Specification of Errors	8
Question	8
Argument	8
Conclusion	6, 10

Table of Cases Cited

People of the State of New York v. *Irving Nitzberg*, 287 N. Y. 183, 38 N. E. (2d) 490	8, 10

Statute Cited

United States Code, Title 28, Section 1254	3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 204

TOLLEY B. SPRIGGS,

Petitioner,

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Tolley B. Spriggs, in support of his Petition for a Writ of Certiorari to review the final judgment of the United States Court of Appeals for the District of Columbia Circuit, entered June 30, 1953, affirming his conviction on one count charging the petitioner with abortion, respectfully shows:

A

Summary Statement of the Matter Involved

This proceeding was initiated by an indictment in the United States District Court for the District of Columbia (R. 1). The indictment charged the petitioner with having procurred the miscarriage of one Mary Cooper by use of instruments and that the said Mary Cooper died as a result of the acts of the petitioner.

Petitioner was found guilty by a jury.

Thereafter, on October 24, 1952, petitioner was sentenced to be imprisoned for a term of no less than four years and not more than twelve years.

FACTUAL SITUATION STATEMENT OF THE CASE

The principal witness for the Government was one Clifford Andrews who testified that Mary Cooper was his girl friend and that on November of 1951 he and Mary went to the office of the petitioner, who is a doctor, and the petitioner examined her out of Andrews' presence. He said they again visited the petitioner and asked the petitioner how much would be charged for an abortion and the petitioner answered that it would be $100.00. That at a later date he, Mary Cooper and a Sam Murphy went to see the petitioner and asked him if he would accept Murphy's check for $100.00 for the abortion and the petitioner said no because it was on an out-of-town bank.

Andrews said he went to the petitioner once again and gave the petitioner $90.00 cash to perform an abortion on Mary Cooper and that the petitioner did perform the abortion in his presence on Saturday, December 1, 1951. This witness said he was present during the entire time that the petitioner performed the abortion. After that Andrews said he took Mary Cooper to the Dunbar Hotel where they

registered as man and wife under a fictitious name. That Mary died there on December 13, 1951.

The witness Andrews said that when he was first questioned by the police he made a detailed statement wherein he said Mary had been in New York the weekend in question and came back sick and that the petitioner treated her after that and did not abort her. (R. 4) But after they kept him in custody for a number of hours he told them what has been outlined above.

The Government introduced into evidence a letter from the deceased to her sister in New York and a letter from the sister in New York addressed to Howard University. The Court admitted these letters over objection. These letters were introduced for the purpose of corroborating the witness Andrews when he said that Mary Cooper had not gone to New York but had set that up with her sister in order to be absent from Howard University where she was a student.

The Government's case stood or fell upon the testimony of Andrews. He was corroborated in some small matters by other witnesses. Dr. Christopher Murphy, Deputy Coroner, testified that Mary Cooper had died from an abortion.

B

Statement of the Jurisdiction of This Court

1. Statutory Provision Believed to Sustain the Jurisdiction. The jurisdiction of this Court is invoked under Section 1254 of Title 28 of the U. S. Code.

C

The Question Presented

Can a conviction be sustained upon the testimony of an accomplice who is only properly corroborated in unessential details and as to essential details only by a letter of the

deceased and a letter from a person who is in Liberia and unavailable at the trial?

D

Reasons Relied On for the Allowance of the Writ

The only witness in the Trial of this case in the Trial Court who testified that the petitioner aborted the deceased was one Clifford Andrews who by his own admission was an accomplice and the Trial Court so found him to be and instructed the Jury as a fact that he was. The witness Andrews testified that when he was first questioned by the Police he gave them a statement which was exactly the same as a written statement he had signed earlier that day. That statement which was signed was introduced into evidence as "Defendant's Exhibit No. 1" (R. 4). Andrews said that Mary Cooper had obtained permission to leave the school dormitory at Howard University for a weekend trip to New York and left him on Friday, November 30, 1951 with the statement that she was going to New York and that he did not see her again until Saturday, December 1, 1951 between 9:30 and 10:00 p.m. She told him at that time that she had ptomaine poison and he knew that that was what it was because she had had it once before. He suggested that she get to the school dormitory immediately. She said that she did not care to go there and, therefore, he obtained a room for them at the Dunbar Hotel where he registered as Mr. and Mrs. Theodore Owens. He stated that the first time he contacted the petitioner was on Sunday, December 2, 1951. That as a result of his calling Dr. Spriggs, several visits were made to the Dunbar Hotel by him to treat the said Mary Cooper up to and including December 13, 1951 when Dr. Spriggs called and found Mary Cooper dead. He stated that on every visit that Dr. Spriggs made to Miss Cooper he was present at all

times and observed everything that he did and that he did not at any time make a vaginal examination or insert anything into her vagina and is positive that had he done so, he Andrews, would have seen it.

Andrews testified that after he had made this statement to the Police they put him in a cell where he remained for a number of hours and that after being in the cell for several hours he decided to change the story that he had given the Police. In his second statement to the Police he repudiated his first statement and said that was one concocted by he and the doctor and that the truth was that he had paid the doctor to abort Mary Cooper and had been present and saw him do it.

The Government, in an attempt to corroborate Andrews, introduced a letter written by the deceased to her sister in New York wherein she requested that sister to write to Howard University and ask that she, Mary Cooper, be allowed to visit with her in New York the weekend including Saturday, December 1, 1951. The Government introduced into evidence a letter from the sister Maggie Cooper from New York to Howard University asking that Mary Cooper be allowed to visit her in New York for the weekend including December 1, 1951 (R. 3). The admission of these letters was objected to but they were admitted by the Court. It is submitted that the Court erred in allowing Andrews, the accomplice, to be corroborated by these letters. These letters should not have been admitted as one was by a deceased person and the second by a person who was not available at the trial but, as stated by the Government, in Liberia. The Government stated that the said Maggie Cooper had been advised well in advance of the trial that her presence was desired and the trial date given her. In other words, two letters were in evidence and the defense could not cross-examine either person that had written them. The admis-

sion of the letters had the effect of corroborating Andrews when he said that Mary Cooper had not gone to New York as he had first stated and helped in that way to establish his credibility. The case of the *People of the State of New York* v. *Irving Nitzberg,* 287 N. Y. 183, 38 N. E. (2d) 490, holds that this cannot be done.

The Court in this case found as a matter of fact that the witness Andrews was an accomplice and so instructed the Jury and we believe that this petitioner should not have been convicted on the testimony of such a person who was illegally corroborated in one instance and to a very small degree in other instances.

Conclusion

The question presented is of grave public importance and the petitioner has received a very substantial sentence.

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the District of Columbia Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Court of Appeals in the case numbered and entitled on its docket No. 11,615, Tolley B. Spriggs, Appellant, vs. United States of America, Appellee; to the end that this cause may be reviewed by this Court, as provided for by the statutes of the United States of America; and that the judgment of the said Court of Appeals be reversed by this Court and for such further relief as to this Court may seem proper.

Dated: July 24, 1953.

H. CLIFFORD ALLDER,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 204

TOLLEY B. SPRIGGS,

Petitioner,

vs.

UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of Courts Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit has not yet been reported, but appears at R. 59.

Jurisdiction

1. The date of the Judgment to be reviewed is June 30, 1953.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Title 28, Section, 1254, U. S. Code.

Statement of the Case

This has already been stated in the preceding Petition and is hereby adopted and made a part of this brief in the interest of brevity.

Specification of Errors

Errors urged and the question presented are contained in the Petition for Writ of Certiorari (*supra*).

The summary of Arguments will follow the order set forth in the Petition.

Question

Can a conviction be sustained upon the testimony of an accomplice who is only properly corroborated in unessential details and as to essential details only by a letter of the deceased and a letter from a person who is in Liberia and unavailable at the trial?

Summary of Argument

The *People of the State of New York* v. *Irving Nitzberg*, 287 N. Y. 183, 38 N. E. (2d) 490.

Argument on Question

The only witness in the Trial of this case in the Trial Court who testified that the petitioner aborted the deceased was one Clifford Andrews who by his own admission was an accomplice and the Trial Court so found him to be and instructed the Jury as a fact that he was. The witness Andrews testified that when he was first questioned by the Police he gave them a statement he had signed earlier that day. That statement which was signed was introduced into evidence as "Defendant's Exhibit No. 1" (R. 4). Andrews

said that Mary Cooper had obtained permission to leave the school dormitory at Howard University for a week-end trip to New York and left him on Friday, November 30, 1951 with the statement that she was going to New York and that he did not see her again until Saturday, December 1, 1951 between 9:30 and 10:00 p. m. She told him at that time that she had ptomaine poison and he knew that that was what it was because she had had it once before. He suggested that she get to the school dormitory immediately. She said that she did not care to go there and, therefore, he obtained a room for them at the Dunbar Hotel where he registered as Mr. and Mrs. Theodore Owens. He stated that the first time he contacted the petitioner was on Sunday, December 2, 1951. That as a result of his calling Dr. Spriggs, several visits were made to the Dunbar Hotel by him to treat the said Mary Cooper up to and including December 13, 1951 when Dr. Spriggs called and found Mary Cooper dead. He stated that on every visit that Dr. Spriggs made to Miss Cooper he was present at all times and observed everything that he did and that he did not at any time make a vaginal examination or insert anything into her vagina and is positive that had he done so, he, Andrews, would have seen it.

Andrews testified that after he had made this statement to the Police they put him in a cell where he remained for a number of hours and that after being in the cell for several hours he decided to change the story that he had given the Police. In his second statement to the Police he repudiated his first statement and said that was one concocted by he and the doctor and that the truth was that he had paid the doctor to abort Mary Cooper and had been present and saw him do it.

The Government, in an attempt to corroborate Andrews, introduced a letter written by the deceased to her sister

in New York wherein she requested that sister to write to Howard University and ask that she, Mary Cooper, be allowed to visit with her in New York the week-end including Saturday, December 1, 1951. The Government introduced into evidence a letter from the sister Maggie Cooper from New York to Howard University asking that Mary Cooper be allowed to visit her in New York for the week-end including December 1, 1951 (R. 3). The admission of these letters was objected to but they were admitted by the Court. It is submitted that the Court erred in allowing Andrews, the accomplice, to be corroborated by these letters. These letters should not have been admitted as one was by a deceased person and the second by a person who was not available at the trial but, as stated by the Government, in Liberia. The Government stated that the said Maggie Cooper had been advised well in advance of the trial that her presence was desired and the trial date given her. In other words, two letters were in evidence and the defense could not cross-examine either person that had written them. The admission of the letters had the effect of corroborating Andrews when he said that Mary Cooper had not gone to New York as he had first stated and helped in that way to establish his credibility. The case of the *People of the State of New York* v. *Irving Nitzberg*, 287 N. Y. 183, 38 N. E. (2d) 490, holds that this cannot be done.

The Court in this case found as a matter of fact that the witness Andrews was an accomplice and so instructed the Jury and we believe that this petitioner should not have been convicted on the testimony of such a person who was illegally corroborated in one instance and to a very small degree in other instances.

Conclusion

The petition to this Court urging it to exercise its power to supervise the proceedings in the courts below; to decide

the important questions of Federal and general law which has not been but should be decided by this Court to clarify the conflicting opinions concerning certain questions reached as existing in different circuits is thought to present a matter deserving the attention of this Court, to the end that the existing complexities and conflicts may be resolved and an authoritative rule be made available for the guidance of the lower courts; and the existing doubts, confusions, and uncertainties dispelled.

Respectfully submitted,

H. CLIFFORD ALLDER,
Attorney for Petitioner,
Columbian Building,
Washington, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	6
Conclusion	9

CITATIONS

Cases:

Caminetti v. *United States*, 242 U. S. 470	6
Holmgren v. *United States*, 217 U. S. 509	7
Kraut v. *State*, 228 Wis. 386	8
Krulewitch v. *United States*, 336 U. S. 440	6
McQuaid v. *United States*, 198 F. 2d 987, certiorari denied, 344 U. S. 929	6–7
People v. *Nitzberg*, 287 N. Y. 183	7
State v. *Hunter*, 131 Minn. 252	8
Weightnovel v. *State*, 46 Fla. 1	8

Miscellaneous:

Note, 35 L. R. A. (N. S.) 1084–1085	8
Underhill, *Criminal Evidence* (4th ed.), p. 375	8

268719—53

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 204

TOLLEY B. SPRIGGS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 59) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1953 (R. 60). The petition for a writ of certiorari was filed on July 24, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

In a prosecution for an illegal abortion, the trial court admitted over objection a letter from the deceased victim to her sister, requesting that the latter write a letter containing false information to the university where the victim was a student so that the victim could obtain permission to leave the university on the weekend when the abortion occurred. The sister wrote such a letter, also admitted in evidence. The question presented is whether the admission of these letters violated the hearsay rule and constituted reversible error.

STATEMENT

Petitioner, a practicing physician in Washington, D. C., was charged by indictment with violating 22 D. C. Code 201 (1951 Ed.) in using an instrument upon Mary Cooper, who was then pregnant, with intent to procure a miscarriage, as a result of which she died (R. 7). The jury found him guilty, and he was sentenced to imprisonment for a period of four to twelve years (R. 7–9). On appeal, the judgment was affirmed (R. 60).

The evidence may be summarized as follows:

During the first part of November, 1951, Clifford Andrews took his girl friend, Mary Cooper, to petitioner's office for an examination, after which petitioner stated that the fee for an abortion would be $100 (R. 12, 15). On November 21, Andrews telephoned from the Charles Hotel to

make an appointment with petitioner (R. 13, 42, 54–55). On November 23, Andrews went to petitioner's office with Mary Cooper, Sam Murphy, and Anna Banner. Andrews tried to induce petitioner to accept Murphy's $100 check for the abortion, but petitioner insisted upon cash (R. 13–14, 16, 42–45).

On Friday, November 30, Andrews spent the night at his apartment in Washington, D. C., with Mary Cooper (R. 19–20). Mary, a student at Howard University, had written a letter (Gov. Ex. 1–B, R. 2–3) to her sister Maggie in New York, asking her to send a letter to the university dean requesting permission for Mary to spend the weekend in New York, even though Mary's letter stated she had no such intention, in order that she might leave the dormitory over the weekend. Maggie wrote the requested letter (Gov. Ex. 3, R. 3), dated November 26, 1951, and Mary obtained her pass. After proper identification, both of these letters were read to the jury (R. 16–18, 39).[1]

On Saturday evening, December 1, Andrews told petitioner he had the necessary money, and watched him perform an abortion upon Mary Cooper (R. 20–22). Andrews then took Mary to the Dunbar Hotel, where the two registered in

[1] Maggie was in Liberia at the time of the trial and was therefore unavailable as a witness, although the Government had notified her well in advance that her testimony was desired (see Pet. 5).

Room C–415 as Mr. and Mrs. Theodore Owens (R. 22–23, 53). On December 2, after Mary had passed the fetus, petitioner was summoned to the hotel, where a bellhop showed him to Room C–415. Petitioner cut a cord which was still hanging, but could not reach the afterbirth (R. 23–24, 46–47). A few evenings later Andrews took Mary to petitioner's office, where petitioner apparently succeeded in removing the afterbirth with an instrument (R. 25–26). Subsequent to petitioner's treatment of Mary on several other visits to the hotel, on December 13 she died (R. 26–28). During Mary's stay at the hotel from the date of the abortion until her death, the bellhop and Andrews brought her meals to the room (R. 27).

On the evening of December 13, when petitioner went to the hotel room and Andrews expressed his fear that Mary had died, petitioner, before examining the body, predicted, "We are both going to jail now" (R. 28). Andrews explained how Mary had been able to leave the university dormitory for the weekend when the abortion was performed, and that after Mary had found she was not getting well, she had called her sister in New York and arranged for her to send a telegram to the university, dated December 6, stating that Mary was ill in New York (R. 29, 40–41). It was then, Andrews testified, that petitioner and he had "cooked up the story that [Mary] had gone to New York and [he]

was to stick to this story and everything would be all right" (R. 29, 38). Petitioner phoned an undertaker who removed the body. At first petitioner designated pneumonia on the certificate as the cause of death, but a few hours later, when notified by the undertaker that the body had a yellowish tinge indicative of jaundice, petitioner directed that the undertaker bring the certificate to his home, where petitioner changed the designated cause of death to hepatitis (R. 29, 48–52).

On December 14, petitioner drove Andrews to the office of petitioner's lawyer, where Andrews gave a statement in conformity with the story previously concocted by Andrews and petitioner, *i. e.*, that Mary had gone to New York and that petitioner had not performed an abortion. Andrews signed this statement (Def. Ex. 1, R. 4–6) after petitioner's lawyer had procured another lawyer for Andrews. (R. 31–33.) Andrews' lawyer then surrendered him to the police, to whom Andrews told the same "cooked up" story (R. 33, 35). Andrews was jailed for lack of bail at 8 or 9 o'clock that evening; at 3 o'clock the next morning he voluntarily decided to tell the truth, called a police officer, and gave a statement which was consistent with his trial testimony incriminating petitioner (R. 35–36).

On December 14 petitioner gave the police a statement to the effect that on December 2 he had received a phone call from a party representing himself as Mr. Owens at Room C–415 of the

Dunbar Hotel. From that date until the girl's death on December 13, according to petitioner's statement, he treated her for abdominal pains, cough, and jaundice. (R. 56–58.)

ARGUMENT

Properly rejected in the *per curiam* opinion of the court below (R. 59) as presenting "no basis whatever for reversal," petitioner's contentions do not warrant review by this Court.

Pervading petitioner's argument that the letters written by the victim and her sister should have been excluded is the assumption that it was essential to corroborate the testimony of Andrews, which was obviously the basis for the jury's verdict. In this federal prosecution, however, while it may be noted that Andrews' testimony was corroborated in numerous respects,[2] petitioner could have been convicted upon the uncorroborated testimony of Andrews alone. *Caminetti* v. *United States,* 242 U. S. 470, 495; *Krulewitch* v. *United States,* 336 U. S. 440, 454 (concurring opinion of

[2] *E. g.*, the testimony of Anna Banner that on November 21, 1951, Andrews made a phone call from her room in the Charles Hotel (R. 42); the records of the Charles Hotel indicating a phone call on November 21 from Room 104 to Franklin 2155 (petitioner's number) (R. 54–55); the testimony of Banner and Murphy as to their visit with Andrews and Mary Cooper to petitioner's office on November 23 (R. 42–44); the Dunbar Hotel records showing the registration of Mr. and Mrs. Owens (R. 53); and the telegram sent by Maggie Cooper to Howard University (R. 41).

Mr. Justice Jackson); *McQuaid* v. *United States,* 198 F. 2d 987, 989 (C. A. D. C.), certiorari denied, 344 U. S. 929. Accordingly, petitioner's reliance upon *People* v. *Nitzberg,* 287 N. Y. 183 (Pet. 6), is misplaced, for New York has a statute proscribing a conviction on the testimony of an accomplice unless it is corroborated by other evidence tending to connect the defendant with the commission of the crime (see 287 N. Y. at 191).[3]

It is clear, in any event, that the two letters were properly admitted. The letter of the victim Mary to her sister Maggie (Gov. Ex. 1–B) served, not to prove the principal issue, that petitioner had performed an illegal abortion, but merely to show that there was an opportunity for petitioner to commit the crime while Mary was in Washington with no intention of going to New York, and to explain how she was able to obtain leave from Howard University, which as a practical matter she had to do in order to have the abortion performed. In the circumstances, the letter was admissible under the settled principle which ad-

[3] It may be noted that the trial court followed the "better practice" recommended by this Court in *Holmgren* v. *United States*, 217 U. S. 509, 524, by instructing the jury, at the request of petitioner's counsel, before Andrews began to testify that "If one is present, aiding and abetting in the commission of an offense by another, that person is designated in the law as an accomplice and the Jury are charged that you may convict a person on the uncorroborated word of an accomplice but it is the duty of the Court to draw to your attention the character of the person, and you should view his testimony with care and caution" (R. 9–11).

mits into evidence statements of a victim of a crime, "made before the commission of the act, where they are so connected with the act as to form part of the same transaction, and illustrate and explain the crime." Underhill, *Criminal Evidence* (4th ed.), p. 375. Similar evidence has commonly been admitted as part of the *res gestae* in state prosecutions for criminal abortions. See, *e. g.*, *Kraut* v. *State,* 228 Wis. 386, 397–398; *State* v. *Hunter,* 131 Minn. 252, 255–258; *Weightnovel* v. *State,* 46 Fla. 1, 13–14; Note, 35 L. R. A. (N. S.) 1084–1085.

Government Exhibit 3 (Maggie's letter to the dean) was admissible, not to prove the truth of the statements in the letter,[4] but merely to show that Maggie had written it in compliance with Mary's request to carry out the solicited hoax so that Mary might leave the University on a week-end pass. Indeed, had the letter been introduced to prove the truth of the statements it contained, it could only have aided petitioner by tending to show that the victim was not at the scene of the crime. All that matters here, at any rate, is that the hearsay objection was without basis.

---

[4] Actually, the letter was false in representing that Maggie planned to have Mary stay with her in New York.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
ROBERT S. ERDAHL,
ROBERT G. MAYSACK,
Attorneys.

SEPTEMBER 1953.

U. S. GOVERNMENT PRINTING OFFICE: 1953